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Supreme Court of the United States

U. S.
NOV 1974
MICHAEL RODAK, JR., CLE

October Term, 1974

No. 74-111

EDMOND PFOTZER and E. JOHN PFOTZER, Individually and as co-partners doing business under the firm name and style of E. & E. J. Pfotzer,
Petitioners

vs.

THE CITY OF NORWALK; BOWE, ALBERTSON & WALSH; BOWE-WALSH & ASSOCIATES, INC.; MURRAY G. ALBERTSON & ASSOCIATES; ALBERTSON, SHARP & ASSOCIATES; ALBERTSON, SHARP & BACKUS, INC.; JESS C. ALBERTSON and MARINE MIDLAND GRACE TRUST COMPANY, EXECUTORS OF THE WILL OF JOHN G. ALBERTSON, DECEASED; CHARLES T. WALSH; MURRAY G. ALBERTSON and RICHARD C. SHARP,
Respondents

BRIEF IN OPPOSITION FOR A PETITION OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WILLIAM B. RUSH of
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ATTORNEYS FOR:
Murray G. Albertson & Associates;
Albertson, Sharp & Associates;
Albertson, Sharp & Backus, Inc.;
Murray G. Albertson; and
Richard C. Sharp

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STATEMENT OF ISSUES

1. Where a plaintiff obtains a judgment for money damages after a trial by jury and subsequently executes a general release and certifies that the judgment has been fully paid and satisfied, may he thereafter seek to enforce a claimed oral settlement agreement alleged to have been made three years prior to the trial under which he would have received a greater sum of money than that awarded by the jury?

STATEMENT OF CASE

The present case arises out of a contract under which the plaintiff Pfotzer undertook to construct a sewage treatment plant for the City of Norwalk.[1] As a result of disputes which arose among the parties, the plaintiff Pfotzer instituted on August 4, 1969, a lawsuit in the United States District Court for the District of Connecticut, against the City of Norwalk and the defendant engineers claiming monetary damages. (RD-1, Complaint)[2] This first action (Civil Action 13326, C.A. 73-2582) was tried to a jury, with the Honorable J. Edward Lumbard presiding, for 27 trial days and resulted in a jury verdict for the plaintiff Pfotzer in the amount of $217,451.52 plus interest and a verdict for the plaintiff Pfotzer on the issues raised by the counterclaim filed by the City of Norwalk.

On June 2, 1972, the day following the jury verdict, the parties entered into a written agreement which was made a part of the record under which the City of Norwalk withdrew its cross complaint against the defendant engineers; all parties waived the rights of appeal; and

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[1] The present action is brought by Edmond Pfotzer and E. John Pfotzer, individually and as co-partners d/b/a E. & E. J. Pfotzer. For convenience, reference is herein made to the plaintiffs as the plaintiff Pfotzer. Likewise, suit has been brought against various engineers and engineering firms and for convenience, reference is made collectively to the defendant engineers.

[2] References are herein made to the District Court docket number of the particular case referred to wherein the letters RD stand for record documents. The number following the abbreviation RD refers to the particular docket entry number and thereafter will follow a description of the document referred to. Where the particular document is reproduced in the appendix of the plaintiff Pfotzer, reference will also be made to such appendix with the abbreviation App.

the plaintiff Pfotzer gave a general release to all defendants. (App. 117a)[3]

Thereafter judgment was then entered in favor of the plaintiff Pfotzer for the amount of the jury verdict plus interest (App. 115a) and, at a later date, the plaintiff Pfotzer certified by letter that the judgment had been fully paid and satisfied and a Satisfaction of the Judgment was duly filed in the District Court. (App. 32a, 33a)

Approximately eight months thereafter the plaintiff Pfotzer instituted another lawsuit in the U. S. District Court for the District of Connecticut (Civil Action B-708, C.A. 73-1885). (App. 39a) The second action asserts that approximately three years before the trial of the first action, the defendants had entered into a prejudgment settlement agreement with the plaintiff for a sum of money in excess of that which the plaintiff Pfotzer received by way of verdict, thereby entitling the plaintiff to receive as damages the difference between the amount he would have received under the claimed settlement agreement and the amount he in fact received under the jury verdict. In addition, the second action asserted that the City of Norwalk maliciously filed a counterclaim in the first action, thereby giving rise to additional claims of damage.

Upon motion duly made by the defendants (App. 23a), the District Court, Newman, J., dismissed the second action, from which action the plaintiff Pfotzer appealed.

Thereafter the plaintiff Pfotzer moved to modify the

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[3]References herein made to the appendix refer to the appendix filed in this court by the plaintiff in support of the Petition for a Writ of Certiorari.

judgment entered in the first action (Civil Action 13326, C.A. 73-2582), and to vacate the agreement of the parties. The grounds of such motions were essentially the same as the allegations made in the second action. The motions of the plaintiff Pfotzer to modify the judgment and to vacate the agreement were duly denied by the District Court (Newman, J.) for the reasons set forth in its prior memorandum of decision in the second motion. (App. 96a)

The plaintiff Pfotzer then appealed to the United States Court of Appeals for the Second Circuit from:

1. The dismissal of the second action by the District Court; and

2. The denial of the plaintiff's Motion to Modify the Judgment in the first action and to Vacate the Agreement of the parties.

The plaintiff's appeals were consolidated for hearing in the United States Court of Appeals for the Second Circuit which affirmed the orders of the District Court for the reasons set forth in the memorandum opinions of the District Court.

ARGUMENT

1. If the plaintiff ever had rights under the claimed settlement agreement, those rights have been extinguished by the application of the doctrines of election of remedies, estoppel, waiver and merger.

Assuming the existence of a settlement agreement as claimed by the plaintiff Pfotzer (the existence of which is denied by the defendants), the plaintiff is not entitled to

maintain the present action. By proceeding to a trial, verdict and judgment in Civil Action 13326 (C.A. 73-2582), and by thereafter accepting payment of the jury verdict, the plaintiff has pursued a course of conduct which is inconsistent with the enforcement of any rights that he might assert under a settlement agreement entered three years previously. Simply stated, the plaintiffs cannot have the benefit of a settlement agreement or a jury verdict, whichever is higher.

Even if there were a settlement agreement, as alleged by the plaintiff, it would be incumbent upon him to elect either to sue on that agreement or to sue on the original cause of action. See **Restatement**, Contracts §417. As the court stated in **American Textile Machine Corp. v. United States**, 220 F 2d 584, 587 (6th Cir. 1955):

> "The general rule appears well settled that a contract in the nature of accord and satisfaction does not discharge the original obligation unless and until the accord is followed by the satisfaction therein provided, and if the debtor fails to carry out the accord the creditor can enforce either the original obligation or the new accord."

"Election means the making of an active choice between two or more courses of conduct and implies that the act was done under such circumstances that the choice is binding." **DelVecchio v. DelVecchio**, 146 Conn. 188, 196, 148 A. 2d 554 (1959); **Manning v. Connecticut**, 123 Conn. 504, 515, 196 Atl. 777 (1937). The plaintiff Pfotzer, by choosing to go forward on the allegations of Civil Action 13326, elected his remedy thereby extinguishing any rights which he might have been able to claim by virtue of the prejudgment settlement agreement. **Manning v. State of Connecticut**, supra; **Stearns v. Stearns**, 103 Conn. 213, 130 Atl. 112 (1925); **Askam v.**

Platt, 85 Conn. 448, 451, 83 Atl. 529 (1912). Thus, by choosing one of two alternative courses of action, the plaintiff Pfotzer has waived his rights to enforce the settlement agreement and is estopped from asserting any rights thereunder. **Bock v. Meriden Trust & Safe Deposit Co.**, 135 Conn. 94, 100, 60 A. 2d 918 (1948); **Gerber & Co. v. Wilson**, 114 Conn. 378, 380-382, 158 Atl. 803 (1932).

Moreover, the judgment entered in the plaintiff's favor is conclusive with respect to any rights which were, or could have been, litigated in that action and, therefore, any rights which the plaintiff had by virtue of the settlement agreement have been merged in the judgment of June 2, 1972. **Jensen v. Nationwide Mutual Insurance Co.**, 158 Conn. 251, 258, 259 A.2d 598 (1969). See 46 **Am. Jur.** 2d Judgments §390.

The plaintiff Pfotzer seeks to avoid the obvious effect of his own actions by asserting that he was unaware of his rights under the settlement agreement. However, "(I)t is settled by a great multitude of cases as the ordinary rule that a person cannot show his own ignorance of the law for the purpose of avoiding that law to known facts. This is unquestionably the rule as applied in courts of law... The rule in equity does not differ materially from the rule so laid down..." **Richey v. First National Bank & Trust Co.**, 123 Conn. 360, 367, 195 Atl., 732 (1937). "In cases involving a claimed mistake of law, it is only when one person has obtained unconscionable advantage over another that equity will grant relief." **Texas Co. v. Connecticut Petroleum Co.**, 137 Conn. 217, 226, 75 A. 2d 499 (1950); **Richey v. First National Bank & Trust Co.**, supra, 366; **Monroe National Bank v. Catlin**, 82 Conn. 227, 321, 73 A. 3 (1909).

The plaintiff also seeks to emphasize the fact that he is

a layman. However, the file does show that he did have the services of an attorney[4] and, moreover, the short answer to the plaintiff's assertions is found in the case of **Beardsley v. Beardsley**, 144 Conn. 725, 137 A. 2d 752 (1957) where the court stated:

> "Probably few laymen who attempt to act as their counsel ever do understand the full legal implications of everything they do. It would be an intolerable situation if a layman could avoid a judgment years after its rendition by proof that he did not correctly understand or fully comprehend the precise legal consequences of a particular procedure which he voluntarily and intentionally followed."

Thus, assuming the truth of the allegations made by the plaintiff Pfotzer regarding the settlement agreement of August, 1969, he is not entitled either to maintain the second action (B-708, C.A. 73-1885) nor to modify the judgment entered in the first action. (13326, C.A. 73-2582) If such a settlement agreement existed, the plaintiff could have chosen to enforce that agreement or to go to trial on the allegations of his existing complaint. He chose the latter course and he cannot have the best of both worlds.

2. The plaintiff's claims are barred by the agreement of June 2, 1972.

The June 2, 1972 agreement (13326, RD-11; App. 27a-31a), like any contract, is to be interpreted from the language used in the light of the situation of the parties and the circumstances connected with its execution. **Blatt v.**

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[4] Attorney Frank N. Beckwith, was the attorney of record for the plaintiff, and in fact signed the agreement executed by the parties on June 2, 1972. (App. 27a, 31a)

Starr Paper Co., 160 Conn. 193, 202, 276 A. 2d 786 (1970); **Schubert v. Ivey**, 158 Conn. 583, 589, 264 A. 2d 557 (1969); **Sugrue v. Champion**, 128 Conn. 574, 577, 24 A. 2d 890 (1942).

At the time the agreement was executed the parties had just completed three years of litigation and a protracted jury trial. The plaintiff Pfotzer had received a verdict in his favor and further proceedings were necessary in regard to the cross complaint filed by the City of Norwalk against the defendant engineers. At that time, as stated in the agreement itself, all parties believed that they had "legitimate rights of appeal". (App. 27a) The parties therefore entered into the agreement in order to insure the fact that the "judgment shall have finality and not be subject to any further proceedings by way of appeal or otherwise..." (App. 28a) Thus, the parties further agreed to "waive and relinquish any and all further proceedings in the case, including but not limited to, all appeals or possible appeals". (App. 28a) As part consideration for that agreement the plaintiff Pfotzer specifically agreed therein to "release the defendants from any and all other claims which they have or may hereafter have in connection with or arising out of the aforesaid Contract 1-G and the work arising thereunder". (App. 30a)

Immediately after the execution of the agreement, judgment was in fact entered for the plaintiff Pfotzer and the cross claim was withdrawn. Shortly thereafter the plaintiff Pfotzer certified that the judgment had been fully paid and satisfied, a Satisfaction of Judgment was filed (App. 32a, 33a) and the case was, or at least should have been, ended.

However, despite all of the foregoing, the plaintiff

Pfotzer now seeks to have further proceedings in the case; to modify the judgment and to vacate the agreement of the parties. In short, the plaintiff Pfotzer claims that the judgment does not in fact have finality, that the release means nothing and asks that he be allowed to continue his dispute with the defendants.

It is apparent that the matters raised by the plaintiff Pfotzer are connected with and arise out of the construction of the sewage treatment plant. The attempt of the plaintiff Pfotzer to continue the litigation between the parties and to avoid his agreement was answered long ago when the Supreme Court stated: "(I)f parties intend to leave some things open and unsettled, their intent to do so should be made manifest." **United States v. William Cramp & Sons**, 206 U.S. 118, 128, 51, L. Ed. 983, 27 S. Ct. 676 (1907).

A reading of the agreement entered into between the parties clearly evidences the intention to end a most difficult and voluminous dispute between the plaintiff Pfotzer on the one hand and the City of Norwalk and defendant engineers on the other hand. The jury verdict, the judgment of the court and the agreement of the parties has ended that dispute.

CONCLUSION

The historical record of the lawsuits between the plaintiff Pfotzer against the Town of Norwalk and the defendant engineers is adequately documented in the docket entries of the District Court. The case began with the filing of a complaint in August of 1969 and ended in June of 1972. The plaintiff Pfotzer has had his day in court, has been awarded a jury verdict and has received a judgment of the District Court. The plaintiff has certified

that the judgment has been paid and has authorized the filing of the Satisfaction of Judgment. He has received the full measure of his rights under our judicial system. The dispute between the parties involving Contract 1-G is ended.

WHEREFORE, the defendants respectfully request that the Petition for Certiorari be denied.

Respectfully submitted,

By William B. Rush
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Murray G. Albertson; and
Richard C. Sharp

CERTIFICATE OF SERVICE

I hereby certify that all parties required to be served have been served and that on this 14th day of November, 1974, I forwarded by U. S. mail, postage prepaid, two copies of the foregoing Brief to the following: Mr. E. John Pfotzer, P. O. Box 987, Wilmington, Delaware 19899; Leonard S. Hermann and Thomas Keating, Esqs., P. O. Box 798, City Hall, So. Norwalk, Connecticut 06856; and Vincent J. Dowling, Esq., Cooney, Scully & Dowling, 266 Pearl Street, Hartford, Connecticut.

.../s/ William B. Rush...
WILLIAM B. RUSH